January 7. 1769.

MEMORIAL

FOR

John Craich merchant in Aberlemno, and James Mitchell merchant in Montroſe, defenders,

AGAINST

Robert Stephen and others, purſuers.

ROYAL BANK OF SCOTLAND

THE *ſpecies facti* upon which the queſtion at iſſue between the parties depends, is plain and ſimple. The defenders, as creditors to Alexander Arbuthnot late merchant in Montroſe, put their diligence into the hands of a meſſenger, that he might execute a poinding. The effects that occurred ready to be poinded, and leaſt diſtreſſing to the debtor, were a parcel of timber lying in the open air, in what is called a *timber-yard*, incloſed with a rail, having ſeveral entries; one, in particular, on the weſt end of the fold, without any gate upon it, but a looſe flaik, ſupported by two or three looſe trees placed on the inſide, the great end thereof lying upon the ground, and the ſmaller end reſting upon the upper bar of the flaik as a prop to it. It was by this entry that the meſſenger and appriſers got acceſs to the timber-yard, without force or violence of any kind, by puſhing aſide with their hands, or a ſmall ſtaff, the upper part of the trees which propped the flaik; whereupon it fell to the ground: And the queſtion thereupon ariſing is, Whether

ther the meſſenger ought to have deſiſted from the poinding, till letters of open doors were applied for and obtained? and, conſequently, whether the poindings executed by them upon the timber in ſaid yard, is to be annulled for want of the letters to make open doors?

The ground upon which the purſuers have maintained the nullity or illegality of this poinding is, That the chief uſe of this entry was, for carrying into the yard timber from the water-ſide; and that upon the other ſide of the yard or fold there was a door, with a lock and key upon it, which was generally kept locked, and which was the common or uſual entry into the yard.

The defenders, on the other hand, have maintained, That as the law authoriſes the execution of diligence by poinding of the debtor's effects, where-ever they are found, or can be diſcovered, and acceſs had to them without force or violence, or, as it is emphatically expreſſed, locked and ſteeked-faſt places, it is a circumſtance of no moment, whether the entry by which admittance is to be got to the place where the goods lie, is the entry moſt frequently made uſe of or not: That the only caſe in which letters of open doors is requiſite is, where the meſſenger cannot get acceſs without force and violence, by breaking open locked-faſt or ſteeked-faſt doors: That the foundation of this diſtinction, in the execution of captions or perſonal diligence, and of real diligence by poinding, was the protection which the law gave to the domicil of the debtor, as a ſpecies of ſanctuary, that no forcible entry ſhould be made thereunto, by breaking open locked and ſteeked-faſt doors, without a ſpecial authority to make uſe of the King's keys, and which paſs of courſe upon the meſſenger's returning an execution, certifying, that he could not get acceſs to poind the debtor's effects, without breaking open locked or ſteeked-faſt doors; ſo that where-ever action could be had to the houſe or place where the goods to be poinded were lodged, without ſuch forcible entry, by breaking open locked or

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ſteeked faſt doors, there was no neceſſity to apply for an authority to uſe the King's keys: That it was an uncontroverted point, that after acceſs got to the houſe, cheſts, and other repoſitories where the goods were depoſited, might ſafely be broke open, without any ſpecial authority for ſo doing; *a fortiori* might ſuch poinding lawfully be execute in a caſe ſuch as the preſent, where the meſſenger's entry into the timber-yard was effectuate without any force or violence, merely by laying aſide a looſe tree or two, which propped the flaik placed acroſs ſaid entry: ſo that to require letters of open doors in ſuch a caſe, had no authority either in law, reaſon, or practice, and could anſwer no other purpoſe, but to ſtop or impede the execution of legal diligence, which the law in all caſes favoured.

Your Lordſhips, before giving judgement upon this point, were deſirous to know how the practice ſtood in ſimilar caſes; and therefore, of this date, gave the following deliverance. Dec. 20. 1768

" The Lords, before adviſing this petition, with the anſwers, " appoint the parties to give in memorials *hinc inde* with re- " gard to the practice in caſes ſimilar to the preſent."

The defenders do not underſtand, that it was intended by the court, that in theſe memorials the cauſe ſhould be reargued at large, as it is only with reſpect to the practice in ſimilar caſes that your Lordſhips require any further light; to which therefore the defenders mean to confine their memorial, referring to the petition and anſwers, wherein the argument upon the point of law, and ſuch authorities as did occur, are fully ſtated; and which your Lordſhips will no doubt take the trouble of reconſidering before judgement is given.

In general, it may be obſerved, that it is a point of general expediency, that the execution of legal diligence, whatever the nature of that diligence is, ſhould be attended with as little embarraſſment, and ſuperfluous forms, as poſſible. It is the moveables of a debtor that the law enjoins to be firſt taken

taken in execution, at the inſtance of creditors, for ſatisfying their debts: and the general principle is, That theſe may be pointed where-ever they can be found: And as therefore every reſtriction of that diligence, muſt be an exception from the general rule, it lies upon the purſuers to ſhow, that the reſtriction here contended for is authoriſed, either by ſome expreſs law, or warranted by univerſal practice; which therefore throws the labouring oar upon the purſuer: and as no inſtance can be condeſcended upon, far leſs any general practice, where letters of open doors was applied for in caſes any wiſe ſimilar to this, it is a ſtrong negative proof, that none ſuch were deemed requiſite. It is the force and violence neceſſary to be uſed in breaking open locked and ſteiked-faſt doors, which ſeems to have been the ſole motive for requiring a ſpecial warrant, by the King's letters, for authoriſing the meſſenger to make a forcible entry into the houſe, by breaking open locked and ſteiked-faſt doors, in caſe acceſs could not otherwiſe be had. This is an extraordinary remedy, by interpoſition of the King's authority, for that ſpecial purpoſe. Such authority is not requiſite for breaking open cheſts, or other repoſitories, within the houſe, after acceſs has been had to the houſe itſelf; and there is ſurely leſs reaſon it ſhould be extended to caſes ſuch as the preſent, where the meſſenger gets acceſs either to a park, barn, or barn-yard, or other ſuch repoſitory of the goods, by a patent entry, no otherwiſe ſecured than this timber-yard is proved to have been, by laying to the back of the flaik two or three looſe trees to ſupport it, without force or violence of any kind.

The defenders muſt, at the ſame time, acknowledge, that upon converſing ſome of the moſt reputable meſſengers in this city, they have not been able to diſcover any caſe preciſely ſimilar to the preſent; though in general they ſeem all to concur in opinion, that in the preſent, or any ſimilar caſe, they would not have heſitated in executing this poinding in the way and manner it was done, without letters of open doors;

doors; and that they never knew ſuch letters applied for in a caſe anywiſe ſimilar to the preſent.

In general, they inform, that it is the practice in executions of poinding, to enter into any place where the goods are ſuppoſed to be, and to which acceſs can be had, without violence, or breaking open, or demoliſhing, locked or ſteiked faſt doors; and more particularly, that though the door or gate by which they mean to enter, appears to be ſhut, but neither locked nor ſteiked-faſt, if the impediment which keeps it cloſe can be removed, without breaking or demoliſhing the door, they do not underſtand that this is any ſuch impediment as to require letters of open doors.

And for illuſtration of this, they mention the caſe of corns in a barn, which are meant to be poinded, that if the door is locked, as there is generally two doors in a barn, they go round to the back-door to ſee if acceſs can be had to it; and ſuppoſe they find it ſhut, and barred on the inſide, if the bar, or other impediment on the inſide, can be removed, either by the hand from without, or by a ſtaff through any hole of the door, either at the top or the bottom, as by putting it to a ſide, without breaking the door itſelf, they never heſitate to make their entry good in any of theſe ways; and have not hitherto conſidered themſelves, in any ſuch caſe, as under a neceſſity to ſtop the poinding till letters of open doors can be obtained: and if your Lordſhips ſhall think proper, that the practice in ſimilar caſes ſhould be aſcertained, either by the depoſitions or declarations of ſuch of the meſſengers practiſing in and about this city, who are moſt frequently employed in poindings, it is believed they will all concur, that this is not only what they have always underſtood to be the duty of their office, but that the practice has been agreeable thereto; though they would ſubmit to your Lordſhips, whether ſuch proof is requiſite upon their part, as the *onus probandi* lies upon the purſuers, and that no inſtance can be condeſcended upon, where letters of open doors were applied for in any ſimilar caſe.

Whether the entry by which the meſſenger got acceſs to execute this poinding, was the moſt common or uſual entry to the timber-yard, is a circumſtance of no moment. That is what a meſſenger is neither ſuppoſed nor bound to know. The meſſengers from this town are frequently ſent into remote parts of the country, to execute poindings, in matters of any conſequence. Suppoſe the effects to be pointed were a large parcel of cattle, graſing in a park two or three miles in circumference, ſuch as many of the parks in the moſt diſtant parts of the country are, ſurrounded with a ſtone-wall, having many gates, to give acceſs to the park from all the different ſides, they find ſome of the gates locked, others of them neither locked nor ſteiked faſt, but faſtened by a bar, or otherwiſe propped, to prevent their being either blown up with the wind, or blown down, whereby the cattle within might get out, or ſtranger-cattle get in; or, as in this caſe, one or more of theſe entries having only a looſe flaik placed acroſs the entry, propped either with a ſtick or a ſtone, removeable by a touch of the hand or of a ſtaff: The meſſenger has no acceſs to know which of theſe entries are moſt commonly uſed for taking in or putting out the cattle, but finding the acceſs to the park patent, without force or violence of any kind, by laying aſide the ſtock or ſtone that keeps cloſe the gate, or flaik, would it not be highly inexpedient, that after having gone to the country, perhaps a hundred miles, to execute this poinding, he ſhould be obliged to return *re infecta*, and to report an execution, that he could not get acceſs without breaking open locked and ſteiked-faſt doors, in order to obtain letters for making open doors? This, in many caſes, would prove ſuch an embarraſſment in the execution of this moſt uſeful diligence, that your Lordſhips will not be diſpoſed to ſanctify it by your authority, unleſs the purſuers could alledge, and prove, that it was founded in general practice.

The purſuers would have this entry to be conſidered as a ſteiked-

ſteiked-faſt place, becauſe the trees which propped the flaik being laid to on the inſide, the meſſenger could not have replaced the ſame from the outſide after the poinding was finiſhed. But this is plainly too trivial a circumſtance to found a judgement in this caſe. If a looſe ſtone, of two or three pound weight, had been laid to the flaik on the inſide, to prop it, though the flaik itſelf might eaſily have been replaced, it would not have been ſo very eaſy a matter to replace the ſtone; but it would ſurely be moſt abſurd from that circumſtance to characteriſe this a locked or ſteiked-faſt door. But whatever difficulty might have occurred in replacing the ſtone, there could be no earthly difficulty in replacing the looſe trees, which, according to the deſcription given by the witneſſes, the upper or ſmaller end thereof were only laid to or reſted upon the upper croſs bar of the flaik; ſo that your Lordſhips muſt perceive how eaſy it was to replace them: but whether replaceable or not, appears to the defenders to be a very immaterial fact.

From a ſearch that has been made in the ſignet-books, for letters of open doors, commencing no earlier than the 22d Auguſt 1765, and ending the 17th June 1766, the purſuers have excerpted ſome caſes wherein letters of open doors were obtained. But as all and each of theſe apply to the caſe of locked doors, proceeding upon executions returned by meſſengers, certifying, that they could not get acceſs to poind, becauſe of locked and ſteiked-faſt doors, it does not occur what argument can from thence ariſe to the caſe in hand. So that it is unneceſſary to trouble your Lordſhips with particular obſerves upon each, as the only intendment of them ſeems to be, to ſhew that in theſe inſtances letters of open doors were applied for and obtained, where the goods to be poinded were under lock and key, not of the dwelling-houſe, but of the office or out houſes, ſuch as ſhops, cellars, &c. And however juſtly it may be doubted, whether in theſe caſes letters of open doors were requiſite, though the meſſengers

meſſengers, *ob majorem cautelam*, were furniſhed with letters of open doors, it will not follow, that theſe are ſufficient to eſtabliſh the general rule of law, far leſs to extend it by analogy to the caſe in hand, where there was neither locked-faſt nor ſteiked-faſt doors, in any ſenſe whatever.

The only one of theſe inſtances that the defenders ſhall take any notice of, is the poinding at Alexander Allan's inſtance, againſt Thomas Cuming fleſher in Edinburgh; the caſe of which appears to have been, that the meſſenger having paſſed to a park near Brucehill, where Cuming had cattle a-graſing; and having returned an execution that he could not get acceſs to the park, by reaſon of locked-faſt and ſteiked doors, letters of open doors were applied for, and obtained. The analogy of which, to the caſe in hand, is not extremely obvious; and, upon inquiry at the meſſenger, the executer of that poinding, the information they received, and which, if neceſſary, will be proved, is, that the meſſenger and his party went into the park by a ſtile or ſteps, without previouſly examining, whether the gates were locked or not; and that after having proceeded ſo far in the poinding, as to appriſe the cattle upon the ground, when they came to the gate to drive out the cattle, in order to carry the ſame to the croſs, they found the gate locked, and the keeper attending, who refuſed to open it; whereupon the meſſenger ſtopped proceeding in the poinding till letters of open doors were applied for, and obtained; which occaſioned but a few hours delay, by reaſon of its vicinity to this city; and that theſe letters paſs of courſe.

And therefore, to conclude, it is hoped, that your Lordſhips, upon reconſidering this caſe, will be of opinion, that the poinding was regular, and required no letters of o en doors; and therefore will ſuſtain the defence, and aſſoilzie.

In reſpect whereof, &c.

ALEX. LOCKHART.